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IN THE

Supreme Court of the United States

October Term, 1964
No. 729

NATE STEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. .....

NATE STEIN,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Nate Stein respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Southern District of California, sentencing petitioner to three years imprisonment. On each of Counts One, Two and Three, the sentences to run concurrently for a total of three years. Imposition on Count Four was suspended and the defendant granted probation for three years [Tr. Vol. 1, p. 22]. The judgment is found at [Tr. Vol. 1, p. 23].[1]

[1]The record as certified to this Court by the Clerk of the Court below consists of Volume 1, the transcript of the record before the Circuit Court, and five volumes hereinafter referred to as Tr., being the record from the District Court containing the official court reporter's transcript of the testimony taken at the trial. The Clerk's record in the Court of Appeals is referred to as RCA.

Opinions Below.

Trial in the District Court was by jury.

The opinion of this Court Below [RCA p. 35] is appended hereto as Appendix A. (Attach the opinion of the Circuit Court).

The judgment of the Court Below is appended hereto as Appendix B.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is August 28, 1964 [RCA Judgment, p. 48].

2. Timely filing of Petition For Rehearing was denied October 30, 1964 [RCA Vol. 1, p. 49].

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U. S. C. 1254(1).

Questions Presented for Review.

1. Was the evidence sufficient to prove the crimes charged in Counts One, Two and Three of the Indictment?

We contend it was not and that the evidence does not sustain the judgment, and we rely upon the entire record at the time of trial in support of our contention.

(a) Subsidiary to this, we contend the alleged subborned perjury was not corroborated by a witness, and corroborating circumstances as required by law.

See:

Catrino v. United States, 176 F. 2d 884, 888 (9) (1949).

(b) Further subsidiary to the principal question, we contend that before appellant could be convicted of suborning perjury it had to be established beyond a reasonable doubt that he knew Benton would be required to take an oath and that he would then give false testimony.

(c) Further, it had to be established beyond a reasonable doubt that the testimony (affidavit) given by Benton was false and that Stein knew the contents were false and that he knew Benton would make such false statement.

Constitutional Provisions and Statutes Involved.

18 U. S. C. 1622:

> "1622. SUBORNATION OF PERJURY. Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000, or imprisoned not more than 5 years, or both."

18 U. S. C. 1505:

> "1505. INFLUENCING OR INJURING WITNESS BEFORE AGENCIES AND COMMITTEES. Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any Committee of either House, or any Joint Committee of the Congress; or,
>
> "Whoever injures any party or witness in his person or property on account of his attending or

having attended at such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or,

"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being made by either House, or any Committee of either House, or any Joint Committee of the Congress—

"Shall be fined not more than $5,000, or imprisoned not more than 5 years, or both."

This statute was amended in 1962, but has no effect on this prosecution.

The Fifth Amendment to the United States Constitution provides in pertinent part:

". . . No person shall be . . . nor shall be compelled in any criminal case to be a witness against himself *nor be deprived of life, liberty or property without due process of law.*" (Emphasis ours).

Statement of the Case and Evidence Pertinent to This Petition.

The trial court had jurisdiction under 18 U. S. C. 3231.

By an Indictment filed March 11, 1963, in the United States District Court, Southern District of California,

Central Division, Appellant Stein was charged in Count One with a violation of 18 U. S. C. 1622, in that he induced and suborned one Joel Benton to knowingly commit perjury, in that Benton, on June 27, 1958, having taken an oath before competent officers, namely, United States General Accounting Office Investigators for the United States Senate Select Committee on improper activities in the labor or management field, and a Notary Public in a matter in which a law of the United States (2 U. S. C. 191; 31 U. S. C. 53, 117) authorizes an oath to be administered that he would depose and certify truly that written testimony, declaration and deposition subscribed by him was true. Contrary to said oath, he subscribed a matter which he did not believe to be true, and such matter was material to the above said Senate Committee's investigation. And, on or about July 27, 1958, in Los Angeles, the said Benton gave the said investigators an affidavit in which he incorporated by specific reference and attachment a prior written statement he had provided to said investigators on June 8, 1958, which was filed with and made a part of the official transcript of the said Senate Committee [Ex. 168, Part 40, pp. 15,001-15,003] on September 15, 1958, and in said affidavit the following perjurious matter was found.*

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*(a) "That during the period from the latter part of 1955 to June, 1956, he received a total sum of $4400.00 from the Teamsters Union for a survey personally made by him of the commercial trucking operations between Los Angeles and San Francisco." That said testimony was false and contrary to his oath, and both Benton and defendant Nate Stein then and there well knew and believed in that the $4400.00 was not received by Benton for such a survey, and that Benton never made such a survey.

(b) "I further swear that none of the amount noted above, namely, $4400.00, was shared with any person connected in any

Count Two charged a violation of 18 U. S. C. 1505, in that Stein was charged with having unlawfully, corruptly endeavored to influence, intimidate and impede a witness, Benton, in a proceeding in connection with an inquiry and investigation being made by the Select Committee on Improper Activities in the labor-management field of the United States Senate of the 85th Congress, by inducing, commanding, requesting and having the said Benton give false information to said Committee's investigators, to give a false written statement to said Committee, and gave a perjurious affidavit to said Committee's investigators, which was filed with and made a part of the official transcript of said Committee on September 15, 1958 [Ex. 168, Part 40, pp. 15,001-15,003].

Count Three charges a violation of 18 U. S. C. 1505 in practically the same language and the same circum-

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way with the Teamsters Union." That testimony was false and contrary to the said oath taken by Benton, as both Benton and Stein then and there well knew, and that at least some of the $4400.00 was shared with the defendant Nate Stein, a person connected in some way with the Teamsters Union."

(c) "Nate Stein allegedly told Benton that his friend Jimmy Hoffa wanted a confidential count made of trucks operating between San Francisco and Los Angeles; that presumably he was to have gotten someone to help make a 24-hour day count on both the Coast and Inland routes, but he did it himself. He spent two Friday nights and two Saturday nights at Gorman and Santa Barbara. The number of trucks going each way every 24 hours was approximately 800. He made his report to Stein, and some time later Stein gave him a check in the amount of $900.00." It alleged that said testimony was false and contrary to the oath taken by Benton, and that it was so known by Benton and Stein. Benton did not report to defendant Stein, and the $900.00 check was not in payment of Benton's services."

(d) "Early in January or February of 1956, he was commissioned to repeat his truck counting. He did this as before. Upon completion of his assignment, he received a check through the mail for $1,000.00. Said testimony was false and contrary to the oath taken by Benton; that Benton and defendant Stein then and

stances as Count Two, except that it charges that the said Stein did corruptly influence Joel Benton to give false information to said Committee's investigators, to give a false written statement to said Committee's investigators, and give a perjurious affidavit to said Committee's investigators, which was filed with and made a part of the official transcript of said Committee on September 15, 1958 [Ex. 168, Part. 40, pp. 15,001-15,003].

Count Four charged a violation of 26 U. S. C. 7203, in that in the calendar year 1956 the said Stein received a gross income in excess of $600.00, namely, $3,500.00. He was required by law to pay an income tax and make a return to the District Director of Internal Revenue, at Los Angeles, and that he willfully failed so to do [C. T. pp. 2-9, Vol. 1, Tr. of Rec.].

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there knew and believed that Benton received no such commission. Benton did not count the trucks, and Benton did not receive the $1,000.00 check through the mails."

(e) "Some two months later, he received another check for $1,000.00 in the same manner for doing the same work. Said testimony was false and untrue, which Benton and Stein well knew and believed, and knew that Benton did not receive this check for the counting of trucks."

(f) "That Benton was asked by Stein to dream up some type of public relations program which would create a more favorable union image in the public mind. After some time, he came up with an idea, a weekly one-half hour television show. He presented this idea to Stein; Stein read over the idea and said it might have some merit. Some time later, Stein handed him a check for $1,500.00, in June, 1956, with the remark, 'Somebody liked your show idea.' He took that to mean the extra $500.00 was because he had counted trucks exactly as before the latter part of May. This was the last work he did for Stein, the last check he received." Said testimony was false and contrary to the oath taken by Benton, and both Benton and Stein knew it to be false. Benton did not originate an idea for a weekly one-half hour television show and give it to Stein; Benton did not again count trucks, and the $1,500.00 was not for Benton's truck counting, and it was not for Benton's idea for union public relations.

The defendant entered a plea of not guilty to each of the four counts [Tr. Vol. 1, p. 9].

Motions for judgment of acquittal were made and by the Court ordered submitted [Tr. Vol. 1, p. 14]; the Government rests [Tr. Vol. 1, p. 14]; motion for judgment of acquittal was made, order submitted [Tr. Vol. 1, p. 15]; the case was submitted to the jury, the defendant was found guilty on Counts One, Two, Three and Four [Tr. Vol. 1, p. 16].

Motions for judgment of acquittal and for new trial were made. The Court continued the matter [Tr. Vol. 1, p. 16]. The time was extended within which to file motion for new trial.

The verdicts are found at Transcript, Volume 1, page 17.

Written motion for new trial was filed, with points and authorities [Tr. Vol. 1, pp. 17-21].

Motions for judgment of acquittal and new trial were made on August 12, 1963, and by the Court denied [Tr. Vol. 1, p. 22].

The Court sentenced the defendant to three years imprisonment on each of Counts One, Two and Three, sentences to run concurrently, for a total of three years. Imposition of sentence on Count Four was suspended and the defendant granted probation for three years [Tr. Vol. 1, p. 22].

Evidence.

Walter L. Malone testified he was an investigator with the United States General Accounting Office, and that he was loaned to the Senete Committees from time to time for investigation [R. T. p. 6]; that some time

around April, 1958, he was loaned to the McClellan Committee, known as the "Senate Select Committee For Improper Activities in Labor and Management Fields." He met one Joel Benton as a part of his investigation; his first interview was made in 1958; this was at the request of the McClellan Committee [R. T. p. 9]. He stated he communicated the gist of his interview to the McClellan Committee. His second conversation with Benton took place June 6, 1958.

He identified Exhibits 24 and 25 [R. T. p. 10]; these exhibits were sent to the Committee; they were given to him by Benton at the time of his third interview, June 9, 1958.

The witness testified Exhibit 25 was dated June 27, 1958 [R. T. p. 12]. He saw Mr. Benton at Benton's accountant's office. There was another investigator with him at the time.

Exhibits 24 and 25 are attached hereto as Exhibits "C" and "D" in the appendix.

He stated that the second part of Exhibit 25 which is handwritten, was written by Denzel Melvin, another investigator. The three-page typewritten document is a copy of Exhibit 24.

Exhibit 24 was first handed to him June 9, 1958, by Benton [R. T. p. 14].

He was present when Benton was placed under oath by a Notary Public. The affidavit and the typed copy of the statement of June 8, 1958, were sent to the Senate Committee [R. T. p. 17]. He was always acting on behalf of the Committee when he interviewed Benton.

On cross-examination, the witness testified that when Benton gave him Exhibit 24 Benton said he had written

it out himself [R. T. p. 19]. As to the handwritten part of Exhibit 25, the witness testified that Investigator Melvin wrote it out, and it was signed by Benton.

Denzel L. Melvin was called as a witness and testified he was an investigator for the General Accounting Office; that he met Joel Benton when he was assigned to work for the McClellan Committee; that the last three pages of Exhibit 25, the handwritten portion, were in his handwriting; he wrote it on June 27, 1958 [R. T. pp. 24-26]. He said he wrote this statement after he interviewed Mr. Benton; that he showed it to Benton, Benton was then taken before a Notary Public, placed under oath, and he saw Mr. Benton sign it [R. T. p. 27].

The witness Malone was recalled and testified that prior to receiving Exhibit 24 from Benton he had asked him a series of questions, and Benton had answered them. He asked Benton, for the sake of accuracy, if he would write it out, and said he would come back and pick up the statement [R. T. p. 37]. The next time he saw Benton, Benton handed it to him and said, "Here's the statement we talked about."

He testified he served a subpena on Benton to appear before the McClellan Committee on May 26, 1958. He corrected that to state it was June 26, 1958, the day before the affidavit was taken [R. T. pp. 40, 41]. Before he served the subpena, he had already received a handwritten note from Mr. Benton; this was on June 8, 1958 [R. T. p. 41].

Joel Benton was called as a witness and testified that in January, 1955, he went to work for Cole, Fischer and Rogow [R. T. p. 45]. He first met Nate Stein within about 30 days after his employment by Cole [R. T. p.

47]. When he first went to work he really did not have a private office; he used a portion of a room in the Beverly Hills Office of the Sands Hotel. In the fall of 1955, he talked with Nate Stein relative to cashing a check [R. T. p. 52]. Stein said he expected to get a check in the near future, since he did not have a Social Security Number or a bank account, and had no way of cashing it, he asked Benton if he would cash it. The witness stated he agreed [R. T. p. 53].

He identified Exhibit 5, a check Nate Stein had handed to him and asked him to endorse it and cash it [R. T. p. 54]. The handwriting on the back of the check was his [R. T. p. 55]. He testified that at the time Stein handed him the check they walked to the bank a short distance away, they went to the teller's window, they stated they could not cash it, and the manager of the bank said that he did not know Joel Benton and Associates, which was the manner in which the check was made out, and because of the low amount of his balance they would not cash it [R. T. p. 56]. The check was made to Joel Benton and Associates. The witness testified that Joel Benton and Associates actually consisted of stationery which he had originally planned to use to drum up some business [R. T. p. 57]. He testified he did not know whether Stein knew about the letterhead [R. T. p. 58]. The witness stated they were not successful in cashing the check. Stein said, "Okay, give it to me." Stein took it and left.

The witness identified Exhibit 8, a check, and stated the signature on the back of the check was his signature; that he had received the check from Nate Stein. Stein asked him to endorse the check, and he stated that he did not want to. Stein replied, "What the hell, Joe, you have

already endorsed one" [R. T. p. 61]. He stated he had not received any of the proceeds from this second $1,000 check.

The witness identified Exhibit 9, a receipt, which was on the letterhead [R. T. p. 61]. He stated Exhibit 9 was a public relations letterhead of Joel Benton and Associates. He testified he never signed Exhibit 9, the receipt.

A check made payable to Joel Benton for $1,000 was shown to him, and he identified the signature as being that of Joel Benton [R. T. p. 63]. He received this check from Nate Stein; at the time he received the check there was no conversation. Stein merely asked him to endorse it; he did, and handed it back [R. T. p. 64].

He was shown Exhibit 11, a letterhead of Joel Benton and Associates, and stated that the signature of Joel Benton on this letterhead was similar to his, but he did not know whether it his signature; he said it looked similar [R. T. p. 65]. He stated even if it was his signature, when he signed it the typed portion of the exhibit was not there [R. T. p. 65].

He was shown Exhibit 18, a check payable to Joel Benton and Associates, in the amount of $1,500, dated June 21, 1956. He stated the signature on the back was his; he endorsed the check and gave it to Stein; he never received any proceeds of this check [R. T. pp. 66, 67].

He identified Exhibit 19 as a receipt on the stationery of Joel Benton and Associates; he said his signature appeared on it, but he did not know whether it was his [R. T. p. 67].

He identified four checks made payable to Joel Benton, one to Joel Benton and Associates, the total amount

was $4400, from Nate Stein. This was shortly before his birthday in 1957. He listed all of the checks in his income tax return. He testified that at the time of the first check of $900, when Stein called him that day, Stein said, "I will pay the income tax on that check. You list it in your income, and I will pay the tax on it." [R. T. p. 69]. Later in 1957, Stein asked him how much he owed for tax, and Stein gave him $485 in cash [R. T. p. 71]. Early in 1958, he talked with Stein on the phone, in which conversation Stein said he hoped the witness had declared the $4400 in checks, that there was a big investigation going on, that he might be contacted [R. T. p. 73]. At a restaurant in the yearly part of 1958, Stein said a big investigation was going on, and he might be contacted; he said to have a story ready to tell the investigators to account for the money; he was to tell them that he was making a confidential truck count on both Highway 99 and Highway 101 to find out how many trucks travel over these two routes during the course of a 24-hour day [R. T. p. 74]. After his meeting with Stein, Government investigators came to see him. He stated he had told Stein in a restaurant in 1958 that he would tell the story, but he would have to have some idea how many trucks traveled these two routes. Stein said he would find out that information [R. T. p. 75]. Later, Stein gave him the truck count [R. T. p. 76]. He either had a later meeting or on the phone Stein told him to come up with an idea that could be used for broadcasting purposes that would extol the virtues of the various unions [R. T. p. 77].

The witness identified Exhibit 24 and it was received in evidence, went to the jury, and appears at [R. T. p. 81].

He identified Exhibit 25, his signature was at the end. The affidavit was not in his handwriting, but he was present when it was written [R. T. p. 88]. He signed it before a Notary [R. T. p. 89]. The last three pages were identified as 25-B [R. T. p. 92].

He stated he had no further contact with Stein after talking to the investigator from the General Accounting Office; he told Stein he had been contacted [R. T. p. 99].

He stated he had no conversation with Stein between June 6 and 8 [R. T. p. 101]. He gave a copy of Exhibit 25 to Stein.

Over objection, Exhibit 25-B was read in evidence [R. T. p. 92].

The witness was shown the statement of June 8th, and he was asked about the various statements therein, and he stated that the statement that he had told Nate his wife was going to have a baby was true. He said the statement that he was paying heavy alimony and child support, and that Nate asked him how he was fixed for money, was not true. He was not sure he told Stein that he was just getting by. The statement that Stein said he would try to figure out he could make some extra money was not true. The statement concerning a conversation between he and Stein concerning Jimmy Hoffa, and the desire for a confidential count as to trucks that were "piggy-backed" was not true [R. T. pp. 107, 108]. The statement that he accepted an assignment such as that was not true. The statement he spent two nights and two Saturdays at Gorman and Santa Barbara counting trucks was not true. He obtained the figure of 800 from Nate Stein. The statement he made reports to Nate

Stein was not true [R. T. pp. 108-110]. Stein never gave him a check for $900. The statement that he was commissioned to repeat his truck counting in either January or February was not true [R. T. p. 110]. The statement that he had done exactly as he had before at Gorman and Santa Barbara was not true. The statement that he received a check through the mail for $1,000 was not true; Stein did hand him a check for $1,000 [R. T. pp. 110, 111]. The statement that about two months after the checking of the trucks he received another check for $1,000 for doing the same work was not true [R. T. p. 111]. The statement that Nate asked him to dream up some type of public relations program which would create a more favorable union image in the public's mind was not true [R. T. pp. 111, 112]. Mr. Stein never made such a request of him. In 1958, Stein did ask him to make an outline of a public relations program for a better union image in the public's mind. The idea of the television program was never presented to Stein in the year 1955 [R. T. pp. 112, 113]. He didn't know whether he ever presented such an idea to Stein in writing or not; he wrote the thing, but whether he gave it to Stein he couldn't recall [R. T. p. 113]. Stein never told him the television idea had any merit; Stein did give him a check for $1,500; he did not say, "Maybe somebody liked your show idea." [R. T. pp. 113, 114]. The statement that he took that to mean the extra $500 because he had again counted trucks as before was not true. The statement and affidavit, Exhibit 25-B, to the effect that in the latter part of 1955 to June, 1956, he received $4400 from the Teamsters Union for a survey of commercial trucking operations between Los Angeles and San Fran-

cisco was not true; he never made any survey of commercial trucking operations [R. T. pp. 114, 115]. The statement that he had received the proceeds of the $4400 was not true. He never received any [R. T. pp. 115, 116]. He endorsed those checks and handed them to Nate Stein; he did not cash them [R. T. p. 116]. At the time of the making of the statements of June 8 and 27, 1958, he knew the statements were false; he had discussed these specific statements with Nate Stein prior to making them, which was Exhibit 25-A, 25-B was made during the meeting at the accountant's office.

The witness stated he had never been in Detroit, Michigan, or Kansas City; said he never did any publicity work for the Teamsters Union or met James Hoffa; he did not know Frank Collins or Roy Williams or Harold Gibbons [R. T. p. 120]. He knew the location of Schwabs Pharmacy, but he did not know Bernard Schwab, Leon Schwab, or Jacob Schwab, nor Julio Hornada; he had never cashed any checks at Schwabs Pharmacy [R. T. pp. 122, 123]. He committed the perjury because he was in fear; he was actually afraid of a great number of people, including Nate Stein [R. T. pp. 126-138].

On cross-examination, he stated his present source of income was witness fees from the Government [R. T. pp. 139-142] (the payments were substantial); that prior to delivering Exhibit 24 to Mr. Malone he had not seen Stein for three weeks [R. T. p. 142]. The first time he heard anything about the checks being cashed at Schwabs was during the meeting with the FBI [R. T. p. 172]. He did not recall signing a blank piece of paper; he was not sure the paper containing his signature was his signature [R. T. p. 193].

Benjamin Frank Collins testified he was Secretary-Treasurer of the Local Union 299, in Detroit; that James Hoffa was President [R. T. p. 218]. He stated Exhibit 2, a check for $1,500, contained his signature and a machine signature of James R. Hoffa; it was an official check of the Union; he had no personal recollection of handling this transaction [R. T. p. 221]; the check stub showed the amount of $1,500, which was for services; a check for $12.95 was a reimbursement for money advanced by Stein [R. T. pp. 223-229]. He stated Exhibit 14, a check drawn on Local 299, for $963.45, to the Sheraton Hotel, Detroit, indicated Nate Stein had stayed at the hotel [R. T. p. 230]. Other checks indicated Stein had certain current expenses that were paid by the Local 299. He identified Exhibits 18 and 19, checks payable to Joel Benton, in the amount of $1,500 [R. T. p. 237]. Exhibit 23, a check in the amount of $2,476.63, payable to Nate Stein, was for travel expenses to Israel [R. T. pp. 241-243]. The witness stated he personally never hired Nate Stein; stated he did not know Benton [R. T. pp. 243, 244]; he never made any reports to him. Exhibit 15, billings at the Sheraton-Cadillac Hotel, Detroit, was at about the time of the testimonial dinner for Mr. Hoffa in Detroit.

James R. Hoffa testified he was President of the Teamsters Union; he knew Nate Stein; Stein was his friend and an individual who from time to time was assigned to certain responsibilities; said he was paid for doing those things [R. T. pp. 262-264]. Said he could not recall any instance they had paid Stein any money for work performed, but they had reimbursed him on several instances on account of things Stein had paid for; he could not recall offhand just what work it was

Stein did for the teamsters [R. T. pp. 265-268]. With reference to Exhibit 2, he said Stein may very well have performed services, paid money out of his own pocket, and been reimbursed [R. T. pp. 268, 269]. He said Exhibit 8 had apparently been okayed by him; it was made to Benton [R. T. p. 270]. The witness said the check was for advertising [R. T. p. 271]. He never recalled meeting Benton. He stated Stein had been commissioned to do work in the public relations field on the subject of "piggy-back." He wanted to get a résumé of the number of units operating over certain areas and what effect it would have on the transportation problem. Some place along the line, he had discussed it with Stein, and asked him to find out about it and so some work [R. T. p. 272]. The only area he has assigned he imagined was the West Coast. He was confident some place along the line Stein had been requisitioned for public relations in connection with "piggy-back" and he had made reports, had given him information as to the flow of trucks [R. T. pp. 277-282]. He said he obtained information wherever he could get it, from anybody and everybody; they would use that information in providing for contracts [R. T. p. 285]. He said Stein previously took a trip to Israel, he knew many people there; he asked Stein to go because Stein had been there and could introduce him; that either he or his partner Brennan could have okayed billings for expenses of Stein [R. T. p. 300]. He had no recollection of introducing Stein to Williams. He said Exhibits 14 and 15, checks to the Sheraton-Cadillac, were for Stein, he was a guest at the hotel for ten days. He stated he did not know whether Stein was instrumental in having Senator Johnson of Nevada and the Lieutenant Governor of Nevada Bell

present at the testimonial dinner [R. T. pp. 309-310]; he had no recollection of Benton doing any work for the testimonial dinner. Stein made part of the arrangement and catering for the testimonial dinner [R. T. p. 311]. He stated Stein was probably paid nothing for his work in connection with this. He could not recall whether Stein had ever been paid for doing anything [R. T. p. 311]. He had no recollection of handing a check to Stein [R. T. p. 315]. He stated many times Stein brought in ideas on public relations to him; he may have brought a sketch; he had no present recollection of a TV program sketch [R. T. p. 321].

Floyd R. Hayes testified that from 1938 to 1961 he was Treasurer and Secretary of Local 41, Kansas City, Missouri; from 1954 to 1960, Roy Williams was President; checks required two signatures. He testified he did not know Nate Stein; never hired Nate Stein to do any work for Local 41, but he believed Mr. Williams hired him. He identified Exhibit 3, a Local 41 check, dated October 10, 1955, payable to Stein, for $500, the stub showed the purpose of the check was "expenses, public relations." He was not certain what expenses Stein incurred. He identified Exhibit 4, a check of the Local 41, payable to Bellerive Hotel, which is four or five blocks from the truck driver's office in Kansas City. He was not certain why Stein's hotel bill was paid [R. T. pp. 337, 338]. He identified a check, payable to Joel Benton and Associates, for $900, for public relations work by Nate Stein [R. T. pp. 338, 340]. He stated he did not know what public relations work Stein did for Local 41 in Kansas City; he never hired anybody to make a survey of "piggy-back" trucks in operation between San Francisco and Los Angeles [R. T. pp. 340-

346]. He did not know Benton; never hired Benton; stated he does know Stein. Stein was doing public relations work for the Teamsters Union in various parts of that community [R. T. pp. 346-347]. He did not recall whether he talked with Mr. Hoffa before retaining Stein or not; he knew Stein had worked for other Teamsters Unions in other parts of the country [R. T. pp. 360-362]; the Union needed some assistance in Kansas City; they wanted to get acquainted with people who could help them to make their jobs and the jobs for members a little easier [R. T. p. 363]; he never retained Benton; did not attach any significance to the stub of Exhibit 5, a check to Joel Benton and Associates, for $900, and the fact it read for public relations work by Stein. Said he never hired Stein to count trucks [R. T. p. 380].

Jacob M. Schwab testified he worked for Schwabs Pharmacy; that it was a family-held corporation known as Schwabs Pharmacy; they have 5 stores; he does not know Joel Benton, but that he had known Stein for 25 years; they were good friends [R. T. pp. 395-397]. His concern cashes checks for many of their customers [R. T. p. 398]. If a person was a known customer and came in with a check payable to himself and required him to endorse it, and they would cash it [R. T. pp. 397-398]. The check would have to be endorsed by the payee [R. T. p. 399]. He identified the signature on the back of check dated February 24, 1956, Exhibit 8, payable to Benton in the sum of $1,000; he said it must have been Mr. Benton's signature; stated he must have given it to them to cash [R. T. pp. 401, 402]. He stated that when they take a check to be cashed they send it to the bank usually, one of the boys or trusted help take it; he okays

the check, sends it to the bank with the employee; they return the check in at the bank, get the money, and return it [R. T. pp. 402-404]. He did not recall meeting Benton; he must have had a call from someone to cash the check [R. T. p. 405]. He stated Nate Stein must have requested them to cash the check; otherwise, it would not have been cashed, because they did not know Joel Benton [R. T. pp. 406, 407], A trusted customer had to okay Benton [R. T. p. 408]. If Stein had come to the store with Benton, Stein would have had to sign it; he did not know Benton [R. T. p. 409]. He had cashed checks many times when Stein had telephoned and okayed them [R. T. p. 413].

Leon Schwab testified he did not know Joel Benton but he knew Nate Stein. He was shown Exhibit 10, the first endorsement was Joel Benton; said he did not know Joel Benton [R. T. pp. 406, 407]. If Stein had come to from Nate Stein [R. T. p. 425]. When a check comes into the store, they sometimes send it to the bank, cash it, and have the money brought back [R. T. p. 426]. The witness stated that Julio Hornada was a trusted employee, and could be sent to the bank for such checks; that generally they have a customer endorse the check; did not know why it was not done in this case unless someone called on the telephone. He stated that between April 20 and May 17, he had not walked into the store with Exhibit 10 and asked that it be cashed. He did not know Benton [R. T. p. 430]. He had no way of connecting Nate Stein with the check. He stated that if the check made payable to Benton had been brought to the store by Mr. Stein to cash he would have had Stein endorse it [R. T. p. 431]. He stated if Mr. Benton had come into the store with this check, and if Mr. Stein had

telephoned him and asked him to cash it, he would have done so [R. T. p. 433]. The witness said that when he sends Mr. Hornada as a messenger to the bank to cash a check, Hornada brings the money back, and then he hands it to the person who had asked to have the check cashed; he doesn't let the messenger take care of the transaction; he does it [R. T. p. 433]. He was basing his testimony upon their practice; that he had no recollection of this particular check or transaction, but that if Stein had come in to cash the check he would have had to endorse it [R. T. p. 435].

Bernard Schwab testified that he was an executive of Schwabs Pharmacy; that to the best of his knowledge he did not know whether he had ever seen Benton; he knew Nate Stein. He was shown Exhibit 5, check for $900 from Local 41, dated November 4, 1955, payable to Joel Benton and Associates, and stated he did not remember from whom he got that check; it bore Schwabs endorsement. He could not remember if he received it from Nate Stein; he had no recollection. As far as he knew, Stein had nothing to do with the check [R. T. p. 442]. He looked at Exhibit 18, a check dated June 21, 1956, payable to Joel Benton, in the sum of $1,500, endorsed by Joel Benton, then Schwabs Pharmacy, then his signature. He could not remember who brought the check in. Said he might know Benton; he did not know; he would not have cashed the check for a man he didn't know unless it was brought in or okayed by somebody who vouched for it. Said it must have been okayed by someone or he wouldn't have cashed the check. He would have cashed this check for Nate Stein, but not less he had a notation on the check that it was from Nate Stein. He saw no notation on the check [R. T. pp. 443-

445]. He examined Exhibit 16, a check for $156.60, by Local 299, endorsed by Nate Stein, then Schwabs, then his. He cashed the check for Nate Stein; he knew Stein and he endorsed it [R. T. p. 445]. Sometimes they send checks to the bank, sometimes they cash them at the cash box. If the notation "for cash" on it, that means he cashed it out of the cash box, and when he sends the checks to the bank they are cashed and the money replenishes the cash box; he usually carries $3500 in the cash box [R. T. p. 446]. He sent Hornada to the bank many times to cash checks; he would bring the money back, and he would then give the money to the customer [R. T. pp. 447, 448]. It was not uncommon for him to take a $1500 check, or a $1,000, or a $2500 check [R. T. p. 451]. He cashed checks for actors, or agents, if someone whom he knew called and okayed it [R. T. pp. 451, 452]. He had taken many checks from Stein, as much as $500, $600, possibly more. He cashes a lot of checks in a day [R. T. p. 452]. If Nate Stein's name was on it, he would take all the checks he had in his pocket, if he endorsed them [R. T. p. 453]. He did not know if Julio Hornada handled Exhibits 5, 6 and 18 [R. T. p. 461]. He stated that if Mr. Stein brought a check payable to Joel Benton, and asked him to cash it, he would require Mr. Stein to endorse it; said if Stein called him on the phone and said somebody was coming in with a check which he desired to have cashed, if Stein over the phone asked him to cash it, he would have cashed it [R. T. p. 466]. He stated if Stein called him and suggested he cash the check for someone he was sending in, he would want an identification from that person and also he would make some notation on the check identifying the per-

son [R. T. p. 472]. With reference to Exhibit 47, he said he would normally ask one of his employees to go to the bank to obtain the cash, and on the employee's return he would give the cash to the customer himself; he would not permit one of his employees to go to the bank with a check for $900, or $1500, then come back and hand the money to the person who brought the check in to be cashed [R. T. p. 478].

Walter L. Malone was recalled and testified he had seen a copy of Benton's 1955 tax return, and had sent it to the McClellan Committee [R. T. p. 517].

Charles Vitello testified he was with the Intelligence Division of the Internal Revenue Service; he searched the records of Internal Revenue and found that Joel Benton did file a 1955 tax return. He searched the records to see if Nate Stein had filed a tax return, and he said he never had. He also stated Stein told him he had never filed a tax return; this was in 1962 he made this statement [R. T. p. 521].

Benjamin S. Farber testified he was an Assistant United States Attorney. He said he first met Joel Benton in June, 1962. Mr. Benton was not under investigation by the Federal Government at that time [R. T. p. 535].

Luba Mauran testified she knew Joel Benton; that he hired her to be Marvin Cole's secretary [R. T. p. 551]. She knew Nate Stein, often saw him and Benton talking, and Benton told her on one occasion that Stein was doing business relations work for the Union. One time Stein told her, "I think we are going to have something going here." [R. T. pp. 553-555].

Julio Hornada testified he was employed by Schwabs, and had been for 14 years as a stock man [R. T. p.

587]; said he was sent to the bank by Mr. Schwab; he was asked what he did with the money when he gets back to the store, and he stated that if Mr. Schwab were there he would give it to him; otherwise, he would give it to the person who owns the check. He said he gave money to Nate Stein one time [R. T. pp. 588-590]. He said Schwab gave him Exhibit 5, he went to the bank, cashed it, came back and gave the money to Mr. Schwab [R. T. p. 591]. He said Stein probably was there, but he didn't remember; that was nine years ago [R. T. p. 592]. He stated he never cashed a check for Joel Benton. H looked at Exhibit 10, a check for $1000, and stated Schwab sent him to the bank to cash it, but he does not remember whether Stein was there or not [R. T. p. 593]. He said he had something to do with Exhibits 16 and 18. Mr. Schwab told him to take the checks to the bank; he did; brought back $1600. He could not remember if Nate Stein was there. He did not remember ever handing any money to Nate Stein at Schwab Pharmacy [R. T. pp. 594, 595]. After reading a statement in Exhibit 45, he said the proceeds of the $900 check went to Stein [R. T. p. 602]. With reference to Exhibit 10, he said Stein received the proceeds [R. T. p. 602]. He looked at Exhibits 16 and 18, checks dated June 21, 1956, and after reading the statement in Exhibit 45, he stated that Stein received the proceeds from the checks [R. T. p. 602]. He stated that he went to the bank practically every day; he would have a number of checks, and as to the $900 check, when he went to the bank, came back and gave the money to Mr. Schwab, he did not actually see Mr. Schwab hand the money to Mr. Stein; he did not remember [R. T. p. 608]. With reference to Exhibit 10, he did not remember if Mr.

Nate Stein was in the store that day [R. T. p. 609]. With reference to Exhibit 16, check for $156.60, Mr. Schwab gave him the check, he cashed it, brought the money back; he did not see him hand the money to Stein or anybody else [R. T. p. 611]. With reference to Exhibit 18, check for $1500, he took the check to the bank, cashed it, gave the cash to Mr. Schwab. He does not recall if Mr. Schwab gave the money to anyone else [R. T. p. 612]. During the years with Schwabs he has taken hundreds of checks to the bank for cashing. With reference to the check cashed July 6, 1956, he could not remember cashing a check for any other person that day [R. T. pp. 614, 615]. He testified he did not remember taking any other checks on December 22, 1955, when he cashed the $900 check, or cashing any checks for any other person [R. T. p. 617]. The witness testified he gave the $900 after he cashed the check to Mr. Schwab [R. T. p. 625].

On recross-examination, he replied, "Right" when he was asked with reference to each one of the checks he had been shown both by Mr. Sheridan and the cross-examiner. He said it was Schwab who gave him the checks, told him to go to the bank and cash them, and he brought back the money and gave it to Mr. Schwab. Mr. Stein did not ask him to cash the checks. He was shown the $1000 check, and he was asked if this check payable to Nate Stein and endorsed by Schwab was taken by him to the bank, and he replied, "Gee, I couldn't remember. I probably did; I don't know; I am not sure." [R. T. p. 633]. Said he probably gave the money to Nate Stein [R. T. p. 634]. He stated that in 1956, he probably cashed 400 or 500 checks for Schwabs Pharmacy [R. T. pp. 636, 637]. He would go to the

bank, sometimes make deposits; he would also take checks over for the purpose of cashing and returning to Schwabs with the cash. Sometimes he would bring back as much as $1500 [R. T. p. 637].

Nate Stein testified he knew Joel Benton; met him first in 1954, at the Sands Office, on Beverly Drive, Beverly Hills. He became very well acquainted with Benton; discussed business several times; he discussed going into business together; opening up a public relations office or getting advertising accounts [R. T. pp. 646, 647]. He stated Benton one time discussed the subject of printing stationery. He stated he had seen Exhibits 11 and 19, or stationery similar to that; Mr. Benton showed it to him. Mr. Benton stated he was going to have some made up. He discussed with Benton the subject of actually obtaining accounts; Benton was to operate the business; he was going to get 33⅓ at first; his job was to get accounts [R. T. pp. 648, 649]. He showed Benton a folder with stars on it; motion stars endorsing different products; he tried to make it go, and it didn't go; Benton thought maybe he could revise it. He discussed Mr. Hoffa with Benton, also the Teamsters Union. He was present at a banquet for Mr. Hoffa in 1956 in Detroit [R. T. pp. 649, 650]. He arranged for entertainment and for speakers; he arranged for Senator Johnson, from Nevada, and Rex Bell, Lieutenant Governor of Nevada at that time, to be present. They both came; they stayed at the Hotel Sheraton-Cadillac, in Detroit. He was present with Hoffa and Rex Bell and others at the dinner [R. T. p. 650]. He identified Exhibit "A", a picture showing Mr. Brennan, Mr. Hoffa, Rex Bell, and himself; Brennan was an associate of Hoffa [R. T.

p. 651]. This photograph was taken at the Coliseum at the dinner; there were 2800 people there. He identified Exhibit 2 as a check he had seen before, it was for expenses; it was made to Joel Benton and Associates; he did not cash the check at Schwabs Pharmacy. He examined Exhibit 5, dated November 1, 1955, was paid to Joel Benton. He did not dash the check at Schwabs Pharmacy; he was not present when this check was cashed at Schwabs. He had a conversation with Schwab about cashing checks for Joel Benton; he called Schwab up. He was not present when Exhibit 5 was cashed. Julio Hornada did not hand him $900 after the cashing of Exhibit 5 [R. T. p. 654]. He did not cash Exhibit 8, dated February 24, signed Joel Benton; he was not present when Hornada went to the bank, if he did, with this check. About February 24, 1956, Hornada cashed another check; he never delivered the proceeds of the check to him. The check dated April 20, 1956, to Joel Benton, for $1000, was not cashed by him at Schwabs Pharmacy; he never received any part of the check. He called Mr. Schwab on the phone about cashing the check for Benton [R. T. pp. 655, 656]. He stated he did not receive pay from the Teamsters for arranging the banquet attended by Senator Johnson at the Sheraton-Cadillac, in Detroit. They paid his expenses; he was trying to get started with Hoffa; they didn't pay salary, they paid expenses. Mr. Gesler bought him tickets from time to time [R. T. p. 657]. He had seen Exhibit 10 before; it was given to him by either Mr. Hoffa or Mr. Brennan; it was payable to Joel Benton, for $1000. He and Benton had talked about going into business; Benton even made up the stationery; he was tight for money, said he had to

have the check made out; they gave Stein the "piggy-back" business, and he suggested to Benton if he wanted to do it he would be very happy; he said they would start the business and he would take this money and would get an office going [R. T. p. 660]; that is why the check was made to Joel Benton; he explained it to Hoffa and Brennan at the time; they said they didn't care as long as the work was done [R. T. pp. 660, 661]. He said he talked to Benton about the "piggy-back" business; Benton asked why they didn't have their own men do it; he said he did not know, maybe they wanted it confidential; they wanted to get different figures from different people. Benton replied that it was a start in the right direction [R. T. pp. 662, 663]. He told Benton the best place would be Gorman and Santa Barbara, one on the Coast Highway; they wanted a 24-hour count. Then Benton said he would do it [R. T. p. 663]. He was dealing directly with Mr. Hoffa in connection with this; they all knew about it, the Joint Council [R. T. p. 664]. He said he was not paid for the work in Kansas City; he received his expenses [R. T. p. 667]. With reference to Exhibit 16, he thought he had cashed it at Schwabs Pharmacy [R. T. p. 694.] He cashed many checks at Schwabs. He had an address in Beverly Hills, 449 South Beverly; that was Mr. Entratter's office; he had a bill sent there for a plate that was made for David Ben-Gurion that was used on the trip to Israel, $2.476.63 [R. T. p. 696]. Exhibit 23 was a billing for his trip to Israel, $2476.23 [R. T. p. 697]. He thought Mr. Hoffa's secretary typed that. After he gave them the bill, they gave him a check, Exhibit 22, for his expenses to Israel [R. T. pp. 698, 699]. He thought this was the money he

gave back to his brother, Samuel Feldman; he had advanced him some money. He went to Israel to take care of reservations and look after newspaper people; he was trying to get started in business [R. T. pp. 699, 700]. Benton was a lay-out man, copy man, and had a lot of experience, and he had a lot of contacts; he and Benton were trying to start a business [R. T. p. 700]. He worked for Considine for 20 years, and then tried to start his own business, he signed up a lot of stars, 20 or 30; he struggled along with this thing until the early part '39; he couldn't get started; in '39 and '40 he was at the San Francisco Fair [R. T. pp. 700-702]. They opened the Fair too soon; nobody made any money. The next year they broke even [R. T. p. 702]. He and Benton went into business, he was to get capital, the capital he got from the Teamsters, the four checks, the ones made out to Joel Benton; Benton had no money. This was the money Benton was going to start on; then he was going to give him a third. After they got to $15,000 a year, he would have 50% of the business [R. T. p. 703]. He did not get any money from the check [R. T. p. 704]. He got Exhibit 2 from the Teamsters; he was trying to do something for them, trying to paint a good image in newspapers in different parts of the country [R. T. p. 705]. He was shown Exhibit 25-A, said he had never seen it before [R. T. pp. 706, 707]. He told two or three people, including a Mrs. Skinner and a Miss Melina, that he and Benton were going into business [R. T. p. 707]. He had an advertising company, it was called Starland; he had some literature which was received in evidence, Exhibit "B" [R. T. pp. 710, 711]. He was asked by Government counsel if he ever made any money in any of these enterprises and he said not.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

The Evidence Was Not Sufficient to Sustain the Judgment as to the Counts Relating to Subornation and Corruptly Influencing Benton to Give False Information to the Committee's Investigators and to Give a False Written Statement and a Prejurious Affidavit to Said Committee's Investigators.

It is our contention that a defendant is not guiity of subornation of perjury unless perjury itself was in fact committed and that such perjury is established and corroborated as required by law.

It is our contention that *Hammer v. United States,* 271 U. S. 620, 70 L. Ed. 1119, is authority for the proposition that in a prosecution for perjury the falsity of the oath must be shown by something better than the uncorroborated testimony of a single witness, and this arises out of the theory that when there is oath against oath, and nothing more, the case is not proved. The rule applies to prosecutions, we contend, for subornation of perjury, because perjury and subornation of perjury are really the same offense, and when there is a single witness there is oath against oath, no matter what name the offense on trial be given.

It was said in *Hammer v. United States, supra,* at page 626:

> "The question of law presented is whether the unsupported oath of Trinz at the trial of petitioner is sufficient to justify a finding that the testimony given by him before the Referee was false. The general rule in prosecutions for perjury is that the

> uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in Federal and State Courts is well neigh universal (citing a multitude of cases from practically every jurisdiction in the United States). The rule has long prevailed and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice. . . . As petitioner cannot be guilty of subornation unless Trinz committed perjury before the Referee, the evidence must be sufficient to establish beyond reasonable doubt the falsity of his oath alleged as perjury. The question is not whether the uncorroborated testimony of Trinz is enough to sustain a finding that he was suborned by the petitioner. It is whether as against the petitioner his testimony at the trial is enough to sustain a finding that his oath before the Referee was false."

We contend that before the defendant Stein could be convicted legally of subornation of perjury the evidence must show that he knew that an oath would be required of Benton, and that Benton would give false testimony.

The evidence, we respectfully urge, does not show that Stein knew that Benton would make the false statement. In fact, Benton did not know, apparently, until he arrived at the office, and at that time the affidavit was submitted to him by a Government Agent for Benton's signature and swearing. Oddly enough, the Government

Agent did not swear Benton, but took him before a Notary Public. This all in the absence and without the consent, knowledge and, as far as the record shows, we contend, on the part of Stein.

We direct the Court's attention to the case of *Berra v. United States,* 221 F. 2d 590, 596, 597 (8th Cir.), where the Court said:

> "The decision in Walker v. United States, supra, is controlling here. The Government adduced no evidence to show that on February 21-23, 1954, Schmidt intended, desired, or expected to testify before the Grand Jury, or that the Government had or would request him to testify. On the contrary, Schmidt testified that as late as March 18, 1954, he had no desire, intent, or expectation of testifying. On February 21-23, 1954, the only information Schmidt had concerning the Grand Jury investigation, as we view the record, was what appellant had told him. This is hardly sufficient to qualify him as a 'witness' under the statute."

There is no evidence that Benton intended to testify before the Committee, or that he did actually testify. All he did was give a statement in affidavit form prepared by one of the Government Agents who sought him out and solicited the statement. Benton testified as follows: [R. T. p. 73]:

> "Stein called me on the phone at my office and said he wanted to see me. He then said, 'I hope you declared the $4400 in checks, because there is a big investigation going on and you may be contacted by the Federal men.'"

[R. T. p. 74]:

"Well, he just said that there was a big investigation going on, that I might be contacted and that if I did I should have a story ready to tell the investigators."

All of this was called to the Court's attention at the time of our making a motion for judgment of acquittal [R. T. p. 643]:

"Mr. Parsons: Very well. At this time the defendant Stein moves for a judgment of acquittal, and we respectfully urge that the evidence is not sufficient to sustain any of the counts. May we particularly point out that there is no sufficient corroboration of the perjury. May I direct the Court's attention to—I will get the case—Hammer v. United States, which appears in 271 U. S. 626. It's in the 71 L. Ed.

The Court: I have it. I would suggest we proceed. The motion will be submitted."

The matters were again called to the Court's attention at the time of the making of the motion for new trial, at which time a written memorandum was filed with the Court in support of the motion for new trial [Tr. Vol. 1, pp. 18-21].

We have not here re-stated the evidence, for we have called the Court's attention to the evidence in our summary, and sufficient thereof to make our position plain herein in this argument. We think that the law laid down in *United States v. Bufalino*, 285 F. 2d 408 (1960, 2d Cir.) is applicable. While the defendants there were charged with conspiring to obstruct justice and commit perjury by giving before Federal Grand

Juries false and evasive testimony, the law, we think, is applicable. The Court held in ruling on this matter that the evidence was not sufficient in this language, at page 411:

> "We find that in two essential respects the evidence was insufficient to prove the crime charged. First, we find that the Government failed to introduce sufficient evidence to support a finding that the defendants agreed to lie about the gathering. *Second, we hold that the evidence was insufficient to show that the defendants had reason on November 14, 1957, to anticipate that any of them would be called to testify under oath about the events of that day.*" (Emphasis ours).

In support of our position, we respectfully refer the Court to the case of *Catrino v. United States*, 176 F. 2d 884, 888 (9th Cir., 1949), where the Court said:

> "The jury was instructed that in order to find appellant guilty of subornation of perjury (Count One), two credible witnesses were necessary, or one such witness plus corroborating circumstances; but that one such witness, if believed, was sufficient to convict of the crime of obstruction of justice. The jury was, of course, also instructed that they must be convinced of appellant's guilt, beyond a reasonable doubt. Appellant contends that the instructions should have been the same on both counts. The Federal rule in perjury cases, Weiler v. United States (1945), 323 U. S. 606, 65 S.Ct. 548, 89 L.Ed. 495, 156 A.L.R. 496, and in subornation of perjury cases, Hammer v. United States (1926), 271 U.S. 630, 46 S.Ct. 603, 70 L.Ed. 1118,

> is that the falsity of the oath, i.e., the actual perjury, must be proven in the manner here required by the instructions of the trial judge."

It is our contention that is the rule, that the alleged suborned perjury, in other words, what the Government claims Benton said was false, had to be corroborated by two credible witnesses, or one such witness with corroborating circumstances, which is necessary under the rule.

In connection with the foregoing and subsidiary thereto, it is our contention that the affidavit was not material to the investigation, and that the oath was not administered by one authorized to do so, 31 U. S. C. 117, 31 U. S. C. 53, and we urge that the affidavit by Benton was not testimony as contemplated by the provisions of law relating to Congressional hearings. This was merely a statement solicited by an investigator.

We contend that before the defendant could be convicted legally of subornation of perjury the evidence had to show beyond a reasonable doubt that he knew that an oath would be required of Benton, and that Benton, after being administered such oath, would give false testimony.

The Court instructed the jury as follows:

> "Title 18 USC 1622 provides as follows: Subornation of Perjury. Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be guilty of an offense."

The Court went on further to say and instruct the jury as follows:

> "The essential elements of the offense as charged in Count One are these: The two essential elements

required to be proved in order to establish the offense charged in Count One of the Indictment are: First, that perjury was in fact committed by someone; and, secondly, that the defendant procured; that is, he induced or instigated or ordered that someone commit perjury.

Perjury is the willful giving of false testimony under oath on a matter which is material" [R. T. pp. 733-736].

We respectfully contend that under these definitions and instructions Counts One to Three were not proven.

II.

Certiorari Should Be Granted Because the Convictions and Sentences Resulted From a Proceeding Which Denied Petitioner a Fair Trial Calling for the Exercise of This Court's Power of Supervision.

As was said in *Roviaro v. United States,* 353 U. S. 53, at page 60, 77 S. Ct. 628:

> "A further limitation on the applicability of the privilege arises from *the fundamental requirements of fairness.*"

It has been said in *Miller v. United States,* 120 F. 2d 968, 973, often quoted:

> "The bars which guard the right to a fair trial such as is guaranteed by our Constitution include court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for

its ultimate goal the preservation and protection of the representation and freedom of the individual citizen."

This court's attention, we respectfully assert, should be called to Sections 201(h) and (i) of 18 U. S. C. Ann., which provides as follows.*

We suggest that this section of the code directly applies to Benton and his testimony which he gave on behalf of the Government and on behalf of the McClellan Committee, if it was testimony, as the Government claims it was (the affidavit given to the agent of the committee). This case resolved around the testimony of Benton. It is apparent that he was paid a substantial sum of money by the Government while he was preparing to and testifying on behalf of the Government in this proceeding. Benton testified that his present source of income was witness fees from the Government [Tr. pp. 139-142]. The sum of money was not just the daily witness fees paid an ordinary witness, but amounted to a substantial sum of money for his upkeep.

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*"(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence to take testimony, or for or because of his absence therefrom; or

"(i) Whoever, directly or indirectly, asks demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Conclusion.

For the reasons stated, we respectfully ask that this court grant certiorari to the end that the judgment appealed from be reversed.

We respectfully state that we have made no argument upon the Fourth Count (income tax) for the reason that the state of the evidence was such that it was largely for the trier of fact to determine whether or not there was income and whether or not Stein was required to file a return. The court granted probation on that count.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner Nate Stein.

EDWARD I. GRITZ,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Nate Stein, Appellant, vs. United States of America, Appellee. No. 18,937.

[August 28, 1964]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers and Barnes, Circuit Judges; and McNichols, District Judge.

Barnes, Circuit Judge:

This is an appeal from appellant's conviction on all four counts of a four count indictment. He was convicted on Count I of subornation of perjury in inducing one Joel Benton to testify falsely[1] before a committee of the

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[1]The first count specified the perjury allegedly induced as follows:

"[I]n that he induced and suborned one Joel Benton to knowingly commit perjury, in that Benton, on June 27, 1958, having taken an oath before competent officers, namely, United States General Accounting Office Investigators for the United States Senate Select Committee on improper activities in the labor or management field, and a Notary Public in a matter in which a law of the United States (2 U.S.C. 191; 31 U.S.C. 53, 117) authorizes an oath to be administered that he would depose and certify truly that written testimony, declaration and deposition subscribed by him was true. Contrary to said oath, he subscribed a matter which he did not believe to be true, and such matter was material to the above said Senate Committee's investigation. And, on or about July 27, 1958, in Los Angeles, the said Benton gave the said investigators an affidavit in which he incorporated by specific reference and attachment a prior written statement he had provided to said investigators on June 8, 1958, which was filed with and made a part of the

official transcript of the said Senate Committee (Exhibit 168, Part 40, pp. 15,001-15,003) on September 15, 1958, and in said affidavit the following perjurious matter was found:

(a) 'That during the period from the latter part of 1955 to June 1956, he received a total sum of $4400.00 from the Teamsters Union for a survey personally made by him of the commercial trucking operations between Los Angeles and San Francisco.' That said testimony was false and contrary to his oath, and both Benton and defendant Nate Stein then and there well knew and believed in that the $4400.00 was not received by Benton for such survey, and that Benton never made such a survey.

(b) 'I further swear that none of the amount noted above, namely, $4400.00, was shared with any person connected in any way with the Teamsters Union.' That testimony was false and contrary to the said oath taken by Benton, as both Benton and Stein then and there well knew, and that at least some of the $4400.00 was shared with the defendant Nate Stein, a person connected in some way with the Teamsters Union.

(c) 'Nate Stein allegedly told Benton that his friend Jimmy Hoffa wanted a confidential count made of trucks operating between San Francisco and Los Angeles; that presumably he was to have gotten someone to help make a 24-hour day count on both the Coast and Inland routes, but he did it himself. He spent two Friday nights and two Saturday nights at Gorman and Santa Barbara. The number of trucks going each way every 24 hours was approximately 800. He made his report to Stein, and some time later Stein gave him a check in the amount of $900.00.' It is alleged that said testimony was false and contrary to the oath taken by Benton, and that it was so known by Benton and Stein. Benton did not report to defendant Stein, and the $900.00 check was not in payment of Benton's services.

(d) 'Early in January or February of 1956, he was commissioned to repeat his truck counting. He did this as before. Upon completion of his assignment, he received a check through the mail for $1,000.00.' Said testimony was false and contrary to the oath taken by Benton; that Benton and defendant Stein then and there knew and believed that Benton received no such commission. Benton did not count the trucks, and Benton did not receive the $1,000.00 check through the mails.

(e) 'Some two months later, he received another check for $1,000.00 in the same manner for doing the same work. Said testimony was false and untrue, which Benton and Stein well knew and believed, and knew that Benton did not receive this check for the counting of trucks.'

United States Senate (18 U.S.C. § 1622);[2] in Count II of corruptly influencing Benton to so testify falsely (18 U.S.C. § 1505);[3] in Count III of corruptly influenc-

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(f) 'That Benton was asked by Stein to dream up some type of public relations program which would create a more favorable image in the public mind. After some time, he came up with an idea, a weekly one-half hour television show. He presented this idea to Stein; Stein read over the idea and said it might have some merit. Some time later, Stein handed him a check for $1,500.00, in June, 1956, with the remark, "Somebody liked your show idea." He took that to mean the extra $500.00 was because he had counted trucks exactly as before the latter part of May. This was the last work he did for Stein, the last check he received.' Said testimony was false and contrary to the oath taken by Benton, and both Benton and Stein knew it to be false. Benton did not originate an idea for a weekly one-half hour television show and give it to Stein; Benton did not again count trucks, and the $1,500.00 was not for Benton's truck counting, and it was not for Benton's idea for union public relations."

(Quoted from: Appellant's Brief, pp. 2-5.)

[2]18 U.S.C. § 1622 reads:

"1622. SUBORNATION OF PERJURY. Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than 5 years, or both."

[3]18 U.S.C. § 1505, since amended, read at the time this crime allegedly occurred:

"1505. INFLUENCING OR INJURING WITNESS BEFORE AGENCIES AND COMMITTEES. Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

"Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

"Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the

ing Benton to give false and perjurious information to investigators of the committee (18 U.S.C. § 1505); and in Count IV of willful income tax evasion in 1956 by failure to report the same $3,500 involved in the other counts (26 U.S.C. § 7203).[4]

Sentences on Counts I, II and III of three years confinement, to be served concurrently, were imposed. On Count IV appellant was granted three years probation.

The sole legal question raised on this appeal is the sufficiency of the evidence to prove the crimes charged. By reason of the concurrent sentences, we need find but one of the first three counts supported by substantial evidence to affirm the conviction on all three. *Sinclair v. United States,* 1929, 279 U.S. 263; *Byrnes v. United States,* 9 Cir. 1964, 327 F.2d 825, 830.

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due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House, or any joint committee of the Congress—

"Shall be fined not more than $5,000 or imprisoned not more than 5 years, or both."

This statute was amended in 1962, but has no effect on this prosecution.

[4]26 U.S.C. § 7203 reads:

"7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

On this appeal, of course, we must view the facts in the most favorable light to sustain the judgment below. *Glasser v. United States,* 1942, 315 U.S. 60; *Mosco v. United States,* 9 Cir. 1962, 301 F.2d 180, 181, cert. den. 371 U.S. 842.

We therefore adopt the government's statement of the facts, as appears in the margin.[5]

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[5]"2. *Chronological Order of Facts.*

In early 1955 appellant met Joel Benton at the latter's office in Los Angeles, California. Prior to this meeting appellant knew and had done some work for James R. Hoffa of the Teamsters Union and was paid $756.87. During 1955 appellant continued his financial relationship with James R. Hoffa and the Teamster's Union, and on March 23, 1955 was paid $1500 by a check drawn on Local 299, Detroit, Michigan, which was endorsed 'reimbursement for Expenses.' Also during 1955 appellant worked for Teamster's Local Union No. 41, Kansas City, Missouri, for which he was paid by said Local in four checks as follows:

Oct. 10, 1955——$500 'Expenses—Public Relations';
Nov. 4, 1955—$406.21 'Room for Nate Stein—Public Relations';
Nov. 23, 1955—$500 'Labor Relations Final—In Full';
Dec. 12, 1955—$616.19 'Room for Nate Stein Public Relations'.
(Exs. 3, 4, 6 and 7)

In the fall of 1955 appellant went to Joel Benton in Los Angeles, California, and asked Benton if Benton would do him a favor. Benton said, 'Yes.' Appellant then advised Benton that he, appellant, was expecting to get a check in the near future, and that since he didn't have a bank account or social security number he would have no way of cashing the check, and would Benton cash it for him. Benton agreed. Shortly thereafter appellant again went to Benton in Los Angeles, California and handed him a check [Ex. 5] dated November 1, 1955, payable to Joel Benton and Associates in the amount of $900, and made by Local 41, Kansas City, Missouri. Benton took this check to his bank where he maintained a checking account in his name and, in appellant's presence, Benton endorsed the check and presented it for encashment. The bank refused to cash it as they had no account for Joel Benton and Associates (which was nothing more than a letterhead), and Benton returned the check to appellant. The check was then cashed at Schwabs Pharmacy on December 22, 1955. Later that day, appellant telephoned Benton and requested that Benton report the $900 as his income on his income tax return and appellant would reimburse him for the taxes paid on

To sustain the conviction under Count I for subornation of perjury, the "two witness rule" applies. That is,

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it; this was in fact done. This is one of the four crucial checks. The check itself is dated November 1, 1955 and the '1' is clearly typed over a '4.' The stub of the check is dated November 4, 1955 and bears this legend: 'For Public Relations work by Nate Stein—30 days.'

This check was issued during the period that appellant was working in Kansas City, Missouri.

All the checks issued by Local 41, Kansas City, Missouri, were signed by Roy L. Williams and Floyd R. Hayes, both of whom testified that: they never met Joel Benton, they never hired Joel Benton, they knew appellant, appellant was doing public relations work for their Local, for which he was paid, they never hired anyone to make a survey of piggy-back truck operations, and the $900 check payable to Joel Benton and Associates was not for Joel Benton and was not for counting piggy-back operations in California.

Appellant, on cross-examination, contradicted himself so many ways and so many times that it is difficult to ascertain his contention on this subject matter, but it appears that he claims that James R. Hoffa told him it was all right to have the $900 check of Local 41 made payable to Joel Benton, even though Hoffa had nothing to do with any checks issued by Local 41.

In 1956, on three separate occasions, appellant went to Joel Benton and asked him to endorse a check. Each of these checks was issued by Teamster Local 299, Detroit, Michigan, signed by James R. Hoffa and Frank Collins, and payable to Joel Benton. The checks were for $1000, $1000, and $1500. The stub for each of these checks indicates that the purpose of the check was for: 'advertising $1000.00' 'advertising $1000.00 Re James R. Hoffa Testimonial Dinner,' and 'Advertising $1500.00 and Services Rendered.' For each check issued there is a voucher on Joel Benton and Associates letterhead that corresponds with a check and is stamped 'Paid,' and these indicate that the purpose of these checks was 'Services rendered $1000.00 for advertising—James R. Hoffa's dinner'; 'Services rendered $1000.00 Advertising & Publicity Expenses in connection the James R. Hoffa testimonial dinner'; and 'Advertising and Services Rendered $1500.00.' On each occasion Joel Benton endorsed the check, returned it to appellant, never saw it again, and never received any of the proceeds. Each of these checks was cashed at Schwabs Pharmacy in Los Angeles, California.

In early 1957 appellant telephoned Joel Benton and requested that Benton report the $3500.00 (total of the three checks) on Benton's income tax return, and appellant would reimburse him for the taxes paid on said amount. Benton reported the $3500 as

to show that perjury was actually committed, either two witnesses must so testify, or one witness' testimony to

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his income and appellant reimbursed Benton $485 for the taxes Benton estimated he had paid on the four checks.

During 1956 appellant performed services for James R. Hoffa and for Hoffa's Local 299, for which appellant was at least reimbursed by checks drawn on Local 299. These services performed by appellant included: working on Hoffa's testimonial dinner in Detroit, Michigan, obtaining certain supplies, and travelling to Israel with Hoffa.

All of the checks issued by Local 299, Detroit, Michigan, were signed by James R. Hoffa (by machine) and by Frank Collins, both of whom testified that: they had known appellant since at least 1954; that appellant had performed services for which he was reimbursed by checks drawn on Local 299; they did not know Joel Benton; they did not hire Joel Benton for anything including advertising work or for work in regards to Hoffa's testimonial dinner; and that appellant had worked on Hoffa's testimonial dinner in Detroit, Michigan, in 1956.

Hoffa also testified that the three checks of Local 299, Detroit, Michigan, payable to Joel Benton and totaling $3500.00 were in part for public relations work done by appellant and in part for appellant's work in counting piggy-back trucks running on the west coast. Hoffa had no recollection of Benton doing any work on the truck count or of Stein discussing Benton with him.

On January 30, 1957, the First Session of the 85th Congress passed Senate Resolution 74, which provides as follows:

> '*Resolved*, That there is hereby established a select committee which is authorized and directed to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been engaged in in the field of labor-management relations or in groups or organizations of employees or employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities.'

This resolution established the Senate's Select Committee on Improper Activities in the Labor or Management Field, which was commonly referred to as The McClellan Committee.

At the opening of the hearings before this Committee, the Chairman, Senator John L. McClellan, set forth the purposes of the Committee's investigation in some detail. (Hearings before the Select Committee on Improper Activities in the Labor or Management Field, Part 1.)

Additional Senate Resolutions continued this Committee in operation for all times pertinent to this case. (See: Senate Resolution 221, 85th Congress, 2nd Session.)

that effect must be corroborated by other evidence. *Catrino v. United States,* 9 Cir. 1949, 176 F.2d 884,

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On January 20, 1958 this Committee issued a subpoena for the appellant to appear before the Committee; and on April 11, 1958, in Los Angeles, California. This subpoena was served upon the appellant. (On September 11, 1958, appellant appeared before said Committee and was sworn and testified.) (Hearings before the Select Committee on Improper Activities in the Labor or Management Field, 85th Congress, Second Session, Part 40, pp. 14986-14992.)

After appellant had been subpoenaed but before appellant appeared to testify pursuant to his subpoena, he contacted Joel Benton and said: 'I hope you declared the $4,400 in checks, because there is a big investigation going on and you may be contacted by the federal men.' They then arranged to and did meet in a Los Angeles, California, restaurant, at which time appellant told Benton, 'that there was a big investigation going on, that (he) might be contacted, and that if (he) did that (he) should have a story ready to tell the investigators to account for this money.' Appellant further told Benton that if he was contacted he was to tell them that he had made a confidential truck count on both Highway 99 and Highway 101 for the purpose of finding out how many trucks travel over these two routes during the course of a 24-hour day. Benton agreed to tell such a story and asked appellant for the number of trucks he should say had travelled over these highways. Appellant said he would get such information and give it to Benton. A day or so later appellant furnished Benton with this information. There were additional conversations between appellant and Benton during this period, and once Benton questioned the plausibility of the story he was to tell about getting $900, then $1000, then another $1000 and finally $1500, for a total of $4400, for counting trucks. Appellant then told Benton to come up with some kind of a TV idea which might be used for national broadcasting purposes extolling the virtues of unions. Benton then (in 1958, two years after the money was paid) spent half an hour composing an outline for a TV show.

At the end of May 1958 and during June 1958, Walter L. Malone, an investigator with the United States General Accounting Office assigned to the McClellan Committee, on behalf of said Committee, had a series of contacts with Joel Benton. On June 6, 1958, Malone interviewed Benton in Los Angeles, California, and requested information regarding appellant and the four checks totalling $4400. At Malone's request, Benton, on June 8, 1958, wrote out the information Malone requested and turned it over to Malone the next day. Benton gave a copy of this statement to appellant. Malone sent this seven-page handwritten statement to the McClellan Committee.

On June 26, 1958 Malone served a Committee subpoena upon Benton. On June 27, 1958 Malone, accompanied by another similar

888; *Weiler v. United States,* 1945, 323 U.S. 606; *Hammer v. United States,* 1926, 271 U.S. 620. But the

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investigator, interviewed Benton, took a statement from Benton, took Benton before a notary public where Benton was sworn and signed the statement. This statement specifically incorporated the prior seven-page statement of Benton, and Benton swore that all statements made therein were true and correct. This sworn statement or affidavit of Benton's was then sent to the McClellan Committee, and on September 15, 1958, while Jamse R. Hoffa was testifying before said Committee, this affidavit was read into the record.

During this period that Benton was being contacted by the investigators, Benton and appellant were in contact with each other. In fact, Benton gave a copy of his June 8, 1958 statement to appellant and a copy to Marvin Cole, Benton's employer at the time.

In Benton's affidavit Benton swore to the following things:

A. '. . . that during the period from the latter part of 1955 to June 1956 (I) received the total sum of $4,400 from the Teamsters Union for a survey personally made by me of the commercial trucking operations between Los Angeles and San Francisco, California.'

B. 'I further aver that none of the amount noted above ($4,400) was shared with any person connected in any way with the Teamsters Union.'

C. '. . . he (Nate Stein) told me his friend Jimmy Hoffa wanted a confidential count made of trucks operating between San Francisco and Los Angeles on both the Coast and inland routes. . . . I accepted the assignment. Presumably I was to have gotten someone to help me make a 24-hour a day count on both routes simultaneously but instead I did it myself. I spent 2 Friday nights and 2 Saturday days at both Gorman and Santa Barbara. As I recall the combined number of trucks going each way every 24 hours was approximately 800. I made my report to Nate and some time later he gave me a check in the amount of $900.'

D. 'Very early in 1956, either January or February I think, I was commissioned to repeat my truck counting. I did this exactly as I had done before in both Gorman and Santa Barbara. On completion of my assignment I received a check through the mail at my office for $1000. No letter, note, or other material was enclosed.'

E. 'Approximately two months later I received another check for $1000 in exactly the same way for doing exactly the same work.'

F. 'Meanwhile Nate asked me if I could dream up some type of public relations program which would create a more

two witness requirement is not applicable in showing that perjury was induced by the defendant. *Catrino v. United States, supra* at 888.

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favorable Union image in the public's mind. After thinking about it for a few days I came up with an idea for a weekly (sic) this idea just about as sketchily as I have here (sic) ½ hour television show. . . . I presented to Nate. . . . Nate read over the idea and said it might have some merit and that's the last I heard of it till he handed me a check for $1500 in June of 1956 with the remark that "maybe somebody liked your show idea." I took that to mean the extra $500 because I had again counted trucks exactly as before the latter part of May. This was the last work I did for Nate and the last check I received.'

The above-quoted excerpts were specifically charged in Count One of the indictment as being perjurious.

Joel Benton testified that each of these statements quoted above was knowingly made by him under oath, and at the time he made them that he knew that they were false and contrary to the oath he had taken.

Joel Benton further testified that appellant told him what to say regarding the purpose and handling of the four checks totaling $4400. Benton testified, in essence, that he committed perjury because appellant told him to and he was afraid of appellant. (The Government made an offer of proof regarding the basis for the witness' fear, but the trial court ruled that its prejudicial effect outweighed its probative value.)

The four critical checks totaling $4400 were cashed at Schwabs Pharmacy in Los Angeles, California, without bearing appellant's endorsement. Benton testified he did not know the personnel at Schwabs and he never cashed a check at Schwabs. The personnel at Schwabs testified: that they did not know Benton and would not have cashed a substantial check for Benton alone, and that they had known appellant for many years, and over the years had cashed many checks for him.

It must be noted that the last of the four crucial checks when compared with another check is most revealing. [Exhibits 18 and 16, respectively.] Exhibit 16 is check No. 2065, payable to Nate Stein, and in the amount of $156.60. Exhibit 18 is check No. 2066, payable to Joel Benton, and in the amount of $1500.00. Both of these checks: were made by Local 299, Detroit, Michigan, signed by James R. Hoffa and Frank Collins, dated June 21, 1956, and cashed at Schwabs Pharmacy in Los Angeles, California, on July 6, 1956.

An examination of all of the check exhibits, including those issued to and cashed by appellant and never handled by Benton show the following pattern: the checks were all folded into

Nor is the two witness rule applicable in showing that the defendant obstructed justice under 18 U.S.C. § 1505 by influencing a witness to give false testimony and information to a Senate Committee and its investigators. *Catrino v. United States, supra* at 888.[6] Thus, the testimony of one person alone is sufficient to convict the defendant of obstructing justice under 18 U.S.C. § 1505 (Count II—influencing Benton to give false testimony to the Senate Committee), and giving false and perjurious information to the committee investigators (Count III). We hold that the following evidence was sufficient to sustain the conviction of Stein on both Counts II and III:

(a) The testimony of Benton himself;

(b) Ex. 44—the subpoena of January 20, 1958;

(c) Ex. 30—the statement of Benton, dated July 6, 1962;

(d) Stipulation No. 2, reciting that Exhibits 24 and 25 were read into evidence before the committee;

(e) a fair and careful reading of defendant Stein's own testimony.

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fourths, and the checks were not cashed for some time after they were issued. Appellant even admitted folding his checks.

Three checks were issued by Mr. Feldman, dated September 5, 1956, September 15, 1956, and October 8, 1956, payable to appellant, and in the following amounts: $1,000, $580, and $1,000. The check numbers run consecutively, and all three checks were cashed on October 8, 1956 at Schwabs.

In June of 1962 when the federal grand jury was investigating Joseph 'Doc' Stacher and then Marvin Cole (Benton's former employer), Benton was subponeaed before the grand jury. Benton then voluntarily came to the Government and told his story. Benton himself was not under investigation at the time nor was he awaiting trial." See also: *Cole v. United States*, 9 Cir. 1964, 329 F.2d 437.

(Quoted from Appellee's Brief, pp. 8-18.)

[6]Decided as to 18 U.S.C. § 1503. We see no reason why the same rule would not be applicable to cases arising under 18 U.S.C. § 1505.

And, more particularly as to Count I, there exists the following corroboration:

(f) Exhibits 45 and 47—the affidavits of Hornada and Bernard Schwab, respectively;

(g) the testimony of Hornada and of Schwab;

(h) the testimony of Williams and Hayes;

(i) the testimony of Hoffa and Collins;

(j) Exhibits 5, 8, 10 and 18—the four checks totalling $4,400;

(k) Exhibits 5 and 26A—the stubs for these four checks; and

(l) Exhibits 9, 11 and 19—the vouchers for three of the checks.

We hold that the testimony of Benton to the effect that the testimony he gave to the committee was false was adequately corroborated by the evidence listed above from (f) to (l), inclusive, to satisfy the two witness rule and thus sustain the conviction on Count I. There can be no question that the jury was justified in concluding that Stein knew that the testimony was false and that Stein induced Benton to give it to the committee.

Appellant urges, however, that Benton was not a "witness," citing *Berra v. United States,* 9 Cir. 1955, 221 F.2d 590, affirmed 351 U.S. 131. There, in an income tax case, Berra was accused of obstructing justice by influencing one Schmidt to destroy records. This was almost one month before Schmidt first met with investigating revenue agents, and two months before Schmidt was served with a subpoena. Thus Schmidt was not only not a witness under subpoena; he was at the time in question not even a *probable* witness.

We may assume he might be classified as a *possible* witness; at least in the defendant's eyes. (221 F.2d at 596) But no proof that he then *intended* to testify existed.

Here, appellant knew Benton was a probable witness; Stein had contacted Benton in 1957 to be sure Benton reported the proceeds of the checks in his 1956 income tax return. Stein contacted Benton early in 1958 to tell him about the McClellan Committee investigation, and to warn him he (Benton) might be contacted by federal men. Stein gave Benton the false story to tell when and if he testified—and for no other purpose! Stein later obtained and suggested the specific number of trucks Benton was falsely to report he had seen and counted. He had Benton, two years after the event, invent the phony television show format.

When Stein contacted Benton in 1958, he (Stein) had already been subpoenaed to testify before the committee. He knew then that Benton might be called upon to testify, under oath, as to why Benton cashed these checks. At that time Stein knew the story he told Benton to tell the investigators was false.

Benton did intend to help Stein by giving such testimony; he gave such sworn testimony in affidavit form to government investigators, and this material was read into the investigating committee's records as sworn testimony.

The fact Benton was not subpoenaed to testify at the time he gave his first false testimony is not "vital" and not controlling. He intended to testify. *Smith v. United States*, 8 Cir. 1921, 274 Fed. 351, 353; *Walker v. United States*, 8 Cir. 1938, 93 F.2d 792, 795; *United States v.*

Presser, 6 Cir. 1961, 292 F.2d 171, 174, affirmed by an equally divided court, 371 U.S. 71, rehearing den. 371 U.S. 960; *Samples v. United States,* 5 Cir. 1941, 121 F. 2d 263, cert. den. 314 U.S. 662; *Odom v. United States,* 5 Cir. 1941, 116 F.2d 996, reversed[1] 313 U.S. 544.

We distinguish *Berra v. United States, supra,* on the facts of the cases it cites and relies upon.

Appellant has raised questions on this appeal as to Counts I, II and III, but not with respect to IV—the income tax evasion. The conviction on that count involves no legal question, but purely the issue of whom the jury believed—as to whether the money represented by the checks was earned and should have been reported by Stein or Benton. The jury believed Benton, and not Stein. We are required to affirm.

The judgment is affirmed as to all counts.

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[1]We assume that the reversal was on grounds other than the point here cited. The United States Reports only state that the case was reversed on the ground that the Solicitor General confessed error. That error must have been on some point other than the point here cited, for the fifth circuit later in that year said the same thing in the *Samples* case, *supra,* in which case a writ of certiorari was denied.

APPENDIX "B."

United States Court of Appeals for the Ninth Circuit

Nate Stein, Appellant, vs United States of America, Appellee, No. 18937.

Appeal from the United States District Court For the Southern District of California, Central Division,

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed.

Filed and entered August 28, 1964.

APPENDIX "C."

Exhibit 24.

6/8/58

Mr. Walter L. Malone
U. S. Gen'l. Acctng. Office
Los Angeles, California

Dear Mr. Malone:

The following paragraphs contain the information you requested last Friday, as well as a recap of the information I gave you previously. The date I mention in this report may not coincide with your records because I am giving them to you from memory. However in all other respects this report is accurate:

1 — When did I meet Nate Stein?
Sometime in 1954.

2 — How did I meet Nate Stein?

The office of the advertising agency by which I was employed was in the same building as that of one of our clients . . . the Sands Hotel. At that time I was doing the creative work on that account and met Nate in the Sands office on several occasions and in the cafeteria next door. I assumed he was in the employ of the Sands, although I never asked him nor did he ever tell me he was. I liked Nate and he liked me. As I got better acquainted with him I discovered he was an extremely warm-hearted person who would go out of his way to help people. He had what almost amounted to an obsession about helping orphans and once told me he was arranging a dinner for James Hoffa with the

proceeds to be given to the homeless children in Israel. Sometime in 1955 I told Nate my wife was going to have a baby. He knew I was paying relatively heavy alimony and child support, and when I told him of my wife's pregnancy he asked me how I was fixed for money. I told him I was, as usual, just barely getting by. He told me he'd try to figure out some way I could make some extra money on the outside. I thanked him and forgot about it. But one day, sometime later, when I can't recall, he told me his friend Jimmy Hoffa wanted a confidential count made of trucks operating between San Francisco and Los Angeles on both the Coast and inland routes. The purpose I believe was either to determine how Teamsters Union members would be affected if trucks were "piggy-backed" on trains or if shipments were diverted from trucks to water. I accepted the assignment. Presumably I was to have gotten someone to help me make a 24-hour a day count on both routes simultaneously, but instead I did it by myself. I spent 2 Friday nights and 2 Saturday days at both Gorman and Santa Barbara. As I recall the combined number of trucks going each way every 24 hours was approximately 800. I made by report to Nate and sometime later he gave me a check in the amount of $900. I do not recall the date of the check nor the signature on it, but I am reasonably certain it was a Teamsters Union check drawn on a Detroit bank. Very early in 1956, either January or February, I think, I was commissioned to repeat my truck counting. I did this exactly as I had done before in both Gorman and Santa Barbara. On completion of my assign-

ment I received a check through the mail at my office for $1000. No letter, note or other material was enclosed. Who signed this and the two subsequent checks I received, I haven't the vaguest idea nor do I recall for sure that they were in fact Teamsters Union checks, although there is no question in my mind that they were. Approximately two months later I received another check for $1000 in exactly the same way for doing exactly the same work. Meanwhile Nate asked me if I could dream up some type of public relations program which would create a more favorable Union image in the public's mind. After thinking about it for a few days I came up with an idea for a weekly ½ hour television show. The show was to be filmed using top writers and a 'name' cast. I tentatively titled the show 'The History of American Labor Unions.' The format of the show was both simple and obvious. The show was intended to depict the birth and struggle of the Unions, their victories and defeats, their faults and their virtues and the part they have played in giving the working man a better way of life in America. I felt that such a show, if properly done, would be as dramatic as any series on the air. I presented this idea just about as sketchily as I have here to Nate in handwritten form as I do not type and did not want to use one of the secretaries in my employer's office as he had no knowledge of any dealings I had ever had with Nate, and I didn't want him to know as he might feel, though erroneously, that I was making outside money on his time.

Nate read over the idea and said it might have some merit and that's the last I heard of it till he handed me a check for $1500 in June of 1956 with the remark that 'Maybe somebody liked your show idea.' I took that to mean the extra $500, because I had again counted trucks exactly as before the latter part of May. This was the last work I did for Nate and the last check I received. You asked if I had ever made any trips with Nate. The answer is no! The only trip I ever made with him was when I drove him from his Beverly Hills apartment to the airport to catch a plane.

Finally, for the record, I am not now nor have I ever been a member of any labor union unless my membership in the American Society of Composers, Authors and Publishers could be so construed.

If there is any further information you wish, I shall be happy to furnish it however, if there's anything else I know that would be helpful to you I am unaware of such knowledge.

Sincerely,

Signature, Joel Berton.

APPENDIX "D."

Exhibit 25-B.

State of California, County of Los Angeles.

I, Joel Benton, being duly sworn on oath state that during the period from the latter part of 1955 to June 1956 received the total sum of $4,400 from the Teamsters Union for a survey personally made by me of the commercial trucking operations between Los Angeles and San Francisco, California. The above sum was paid by checks in the amount of $900, $1,000, $1,000 and $1,500 respectively. All the above checks except the one in the amount of $900 were either typewritten or machine printed. The check in the amount of $900 was believed to have been prepared in pen and ink and on green paper stock issued by Local 119 of the Teamsters Union, Detroit, Michigan, sometime in the fall of 1955. I further swear that none of the amount noted above was shared with any person connected in any way with the Teamsters Union. I further swear that I made no promise that any part of the sum in question would be paid to anyone connected with the Teamsters Union.

I further swear that I have read the attached copy of a statement made by me under date of June 8, 1958, to Mr. Walter L. Malone, an Investigator with the U. S. General Accounting Office, Los Angeles, Regional Office, and that all statements made therein are true and correct to the best of my knowledge and belief.

Joel Benton

Subscribed and sworn before me this 27th day of June, 1958 (A stamp and a signature "Ethel M. Andreasen.")